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No. 870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MARY E. SEEBACH,
Petitioner,

v.

JOSEPH M. CULLEN, District Director of Internal Revenue, San Francisco, California, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Mary E. Seebach, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on November 6, 1964. (R. 50)

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is set forth in the record on pages 47 to 49. It is also set forth on pages 11 et seq of the appendix to the petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 6, 1964 page 11-13 of the appendix. This petition is filed within 90 days from the date of the judgment. Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED

There are five questions involved in this application for petition for certiorari. The petitioner was a long-time career employee of the government of the United States and she is entitled to all of the rights, benefits and privileges which Congress had enacted protecting her rights in employment. The first question to be raised is whether an employee can be charged with alleged dereliction of duty occurring during the period in which her services had been rated "satisfactory". The second question involved is whether the Courts can ignore the statutory requirements of the Performance Rating Act of 1950, 5 U.S.C. 2002-2005 which Congress specifically enacted for career employees, such as the petitioner here, but which was not complied with by the Respondents. The third question involved is whether the Respondent, Cullen, could act in the capacity of accuser, prosecutor, and Judge of charges which he himself filed. The fourth question involved is whether the failure to make specific findings of fact ~~officiated~~ the discharge of the petitioner from governmental service. The fifth question is that an alleged hearing was held by a representative of the Respondent, Cullen, but that such official refused the request to call witnesses who had signed statements adverse to the petitioner for cross-examination. In other words, there was a pretended hearing which in fact was not a hearing at all.

STATEMENT OF THE FACTS

The petitioner became an employee of the United States government in the Bureau of Internal Revenue on July 12, 1935. She received various promotions in her job position until she reached the rank and grade of CAF-9. She continued in this employment as an employee of the said Bureau until the date of her illegal and unlawful discharge from governmental service on May 8, 1962.

After 27 years of continuous service with the United States government, on February 19, 1962 certain alleged and pretended charges were filed against her by Respondent, Cullen, which resulted in her dismissal by the decision of Respondent, Cullen, himself on May 8, 1962.

At the time of her discharge from governmental service, as a career employee she did not have any right of appeal to the Civil Service Commission on the merits of her case and petitioner fully exhausted any administrative right of appeal which she had prior to the institution of this action.

This suit was filed below joining the Respondents Cullen and the Members of the Civil Service Commission as parties-defendant. The complaint filed prayed for a mandatory injunction to restore the petitioner to her rightful employment in the United States government in the Bureau of Internal Revenue. The Respondents filed a motion for summary judgment which was sustained by the District Court and on appeal was affirmed by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

The petitioner has already set forth five grounds on which it is believed that this petition for a writ of certiorari should be granted.

This application is made in accordance with Subdivision b of Par. 1 of Rule 19 of this Court in that the United States Court of Appeals for the 9th Circuit has decided an important question of Federal law in conflict with the applicable decisions of this Court and the decisions of the United States Court of Appeals for the District of Columbia. The facts in each regard will be set forth in the order under the questions as proposed herein.

Point 1. It is a well known fact, of which this Court can take judicial notice, that every classified civil service employee of the United States receives a rating at least once a year on the question of his efficiency, and that this rating, which in the case of the petitioner was satisfactory, was an adjudication of her work performance during the time in question. The letter of charges filed against this petitioner by the Respondent Cullen brought out matters which had already been adjudicated by the satisfactory rating given to the petitioner. Any issue as to whether or not she had satisfactorily performed her duties during that time in question had been adjudicated in her favor prior to the time that charges were filed against her. For example, in the letter of charges reference was made to her performance rating which had already been adjudicated. I call the Court's attention to the fact that thirteen of the alleged charges filed against the petitioner occurred during a period of time when the petitioner had received a satisfactory rating. If her work performance had not been satisfactory during that period of time, under the regulations in question the petitioner had a right to a hearing before a board of three, one represented by Management, one represented by the employees and the third member being a representative of the Civil Service Commission. The finding that the petitioner's service was satisfactory during those years was an adjudication binding on the government officials the same as if it had been a judgment of a Court. The issue was res judicata, and the Respondent Cullen had no right to go back of this

adjudication. If he did have the right, as held by the Court of Appeals for the 9th Circuit, then there would never be a time when any employee of the United States government could be sure of the status of his employment. It was a cruel and inhuman thing for the Respondent Cullen to resort to these means.

There have been a number of cases where employees have been charged with inefficiency in their work performance during a period of time in which they were rated satisfactory. It is about time that this Court stopped this illegal practice.

Point 2. The second question involved is whether the Courts can ignore statutes enacted for the protection of government employees who have become so-called career-employees. This statute provides, in part, as follows:

> Performance Rating Act of 1950, 64 Stat. 1098 (1950), 5 U.S.C. 2004 (1958):
>
> "Performance rating plans required by this act shall be as simple as possible, and each such plan shall provide—
>
> (1) That proper performance requirements be made known to all officers and employees;
>
> (2) That performance be fairly appraised in relation to such requirements;
>
> (3) For the use of appraisals to improve the effectiveness of employee performance;
>
> (4) For strengthening supervisor-employee relationships; and
>
> (5) That each officer and employee be kept currently advised of his performance and promptly notified of his performance rating."

The sole purpose of this statute, as shown by the Committee Reports, was to afford protection to career-employees. Page 11 of House Report No. 2277 states as follows:

> "What the subcommittee is interested in, rather, is making certain that career employees are given every consideration to which they are rightfully entitled. Where they are not performing up to standard, the subcommittee wants them to be so informed, along with suggestions and assistance on how to elevate the quality of their work to where it will meet the job requirements. The provisions of section 6 of the Performance Rating Act of 1950 require that this be done, and also provide for a 90-day warning notice. It is this safeguard that the subcommittee does not want to see subverted by administrative misuse of other statutes."

Under this statute the petitioner was entitled to have a 90-day warning notice in which to improve her work performance for the reason that she was a career-employee. The Respondent Cullen did not comply with the provisions of this statute and for that reason alone the petitioner's discharge from governmental service was illegal and unlawful.

The Court below held that she could be discharged without compliance of this statute, but since when are public officials privileged to ignore statutes enacted for the specific purpose of protecting the rights of career-employees such as this petitioner?

In appealing this case to the United States Circuit Court of Appeals for the 9th Circuit, the petitioner hoped that the Court below would render a decision adverse to the decision of the United States Court of Appeals for the District of Columbia both on the question of whether an employee could be charged with inefficiency over a period of time when her work performance had already been adjudicated as satisfactory, and secondly, whether she could be discharged without a compliance with the statute which was enacted primarily for protection of governmental career-employees. This was the first Civil Service case reaching the United States Circuit Court of

Appeals for the 9th Circuit after enactment of the statute giving jurisdiction to District Courts outside of the District of Columbia. (Public Law 87-748 enacted Oct. 5, 1962). It was therefore a little bit unusual for Justice Bastian of the United States Court of Appeals for the District of Columbia to be assigned as one of the judges to adjudicate this case. This is no reflection upon the honesty and integrity of Justice Bastian, but undoubtedly he carried to the 9th Circuit the views of his own Court on these two questions and thus influenced the decisions of the other two Members of the Court. To say that a governmental employee can be charged with inefficiency over a period of time when his or her work performance has been rated as satisfactory and that you can completely ignore a statute enacted for the protection of the government employees, makes a mockery of justice which the petitioner and others in like status should be entitled to receive. The Courts had no right to nullify statutory protection afforded to governmental employees.

Point 3. The third point urged by the petitioner is that Respondent Cullen could not act in the capacity of accuser, prosecutor and judge of his own charges. Respondent Cullen filed the charges against the petitioner and adjudicated his own charges. There is a long line of State decisions holding that an official who files charges against an employee cannot properly adjudicate the same charges. This point of law has been decided in a number of cases that petitioner cites below.

State ex rel. Barnard v. Board of Education, 19 Wash. 9, 52 P. 317, 40 L.R.A. 317, 67 Am. St. Rep. 706

State ex rel. Miller v. Aldridge, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470

State ex rel. La Crosse v. Averill, Tex. Civ. App. 110 SW 2d 1173

Stockwell v. Township Board of White Lake, 22 Mich. 341

Metsker v. Whitesell, 181 Ind. 126, 103 N. E. 1078

Craft v. Davidson, 189 Ky. 378, 224 S. W. 1082

State v. Crane, 36 N.J.L. 394

Sharkey v. Thurston, 268 N.Y. 123, 126, 196 N.E. 766, 767

Point 4. Title 5 (Sec. 652) of the United States Code relating to the discharge of government employees provides as follows:

> "No person in the classified Civil Service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall
>
> (1) Have notice of the same and of any charges preferred against him;
>
> (2) Be furnished with a copy of such charges;
>
> (3) Be allowed a reasonable time for filing a written answer to such charges, with affidavits; and
>
> (4) Be furnished at the earliest practicable date with a written decision on such answer."

The United States Court of Appeals for the District of Columbia has held that before a classified civil service employee may be discharged from governmental service specific findings of fact on any of the charges filed against the employee must be made. This ruling was in the case of *Mulligan* v. *Andrews*, 211 F.2d 28 in which the Court said as follows:

> "Plainly, and we so hold, the requirement of 'reasons' for removal is not satisfied in this case by the conclusion of unsuitability based upon vague refer-

> ences to appellant's answer and facts developed during the investigation. The decision failed to disclose which of the charges contained in the notice of proposed action were relied upon for removal; or indeed, whether removal rested upon any of the charges. Under the provisions of the statute and of the regulations outlined above, only findings upon such charges, specifically identified can constitute the 'reasons' required in the adverse action."

There were no specific findings of fact made by the Respondent Cullen when he discharged the petitioner. The findings were simply that the charges were sustained. There is, therefore, a clear conflict between the decision of the Court below and the decision of the United States Court of Appeals for the District of Columbia in the case of *Mulligan* v. *Andrews, supra.* This point of law is most important and constitutes a conflict within the rules of this Court such as to justify the granting of a writ of certiorari. This factor is important to millions of classified civil service employees who are in governmental service of the United States. Justice Bastian, who wrote the Opinion of the Court below, disagreed with the decision of his own Court in the case of *Mulligan* v. *Andrews, supra.* For this reason alone the application for the writ of certiorari in this case should be granted.

Point 5. The fifth contention made by this petitioner is that an alleged hearing on the charges against the petitioner was held by a representative of the Respondent Cullen, but no testimony was taken and the representative refused to call in any of the persons who had signed statements adverse to the petitioner so that they could be cross-examined. It was described as a hearing, but, in fact, was not a hearing. If it constituted a hearing under the decisions of this Court in the case of *Williams* v. *Zuckert, Secretary of the Air Force*, 371 U.S. 531, 372 U.S. 765, this Court held that if there was a hearing the employee was entitled to have presented for cross-examination the

persons who signed affidavits or made statements adverse to the employee. It is undisputed that the petitioner in this case asked for the presence of those persons and that the representative of the Respondent Cullen refused to call such witnesses so that they could be cross-examined.

If the discharge of the petitioner had taken place after July 1, 1962 under the Executive Order No. 10987 issued by President Kennedy, she would have been entitled to the same hearing as is accorded to veteran preference eligibles under Title 5, Sec. 863, but since she was discharged prior to that time she was not accorded the same rights as classified civil service employees are at the present time or after the time specified in the Executive Order.

CONCLUSION

For the reasons herein stated, the petition for writ of certiorari directed to the United States Court of Appeals for the 9th Circuit should be granted and further action should be taken in accordance with the views of this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,145

MARY E. SEEBACH,
Appellant,

vs.

JOSEPH M. CULLEN, District Director, Bureau of Internal Revenue, et al.,
Appellees.

[Nov. 6, 1964]

Appeal from the United States District Court
for the Northern District of California

Before: MERRILL and DUNIWAY, Circuit Judges, and BASTIAN, Circuit Judge, sitting by designation

BASTIAN, Circuit Judge:

This is an appeal from an order of the United States District Court granting summary judgment in favor of appellees, thereby upholding appellant's dismissal from her position with the Internal Revenue Service.

Judicial review of dismissal from federal employment, a matter of executive agency discretion, is limited to a determination of whether the required procedural steps have been substantially complied with. *Keim* v. *United States*, 177 U.S. 290, 20 Sup. Ct. 574, 44 L.Ed. 774 (1900); and see *Hargett* v. *Summerfield*, 100 U.S.App. D.C. 85, 243 F.2d 29 (1957), and cases there cited. Thus,

the scope of our review is confined to questions of law, and a motion for summary judgment was an appropriate means of reaching and deciding the issues in the District Court.

In the institution of the removal proceedings here attacked, appellant was charged with (1) emotional instability and (2) inefficiency, eleven examples of emotional instability and thirteen examples of inefficiency being offered in support of the charges. Her removal was upheld in all the administrative review proceedings held prior to the filing of this action. The only error claimed by appellant with respect to her removal [1] which we consider substantial is that the notice of removal failed to state specific findings as to the truth or falsity of each of the twenty-four examples of conduct alleged by her superiors to be illustrative of the reasons for her removal.

Appellant's removal was effected pursuant to the Lloyd-LaFollette Act, 37 Stat. 555 (1912), 5 U.S.C. § 652(a) (1958), which permits removal from the classified civil service "for such cause as will promote the efficiency of such service and for reasons given in writing." The Act and the applicable regulations require that the notice of removal "clearly identify which of the reasons are relied upon in taking the adverse action." Appellant's complaint is simply that the reasons for her removal were not stated, as required.

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[1] Appellant's brief discussed several contentions regarding the alleged illegality of the acts of appellees in placing her on sick and annual leave, and on leave-without-pay status pending certain administrative appeals in connection with this case. We do not deal with these points because we believe, and appellant's counsel concedes, that the United States Court of Claims has exclusive jurisdiction over such matters. Jurisdiction in the District Court is precluded by 28 U.S.C. § 1346(d) since Miss Seebach's only relief from the forced utilization of her accumulated leave, if illegal, would be money damages. As appellees note in their brief, the case of *Mary E. Seebach* v. *United States*, No. 123-63, filed April 24, 1963, is pending in the Court of Claims.

We believe that appellant misunderstands the procedural requirements. She equates "reasons" with "examples" and contends that, since twenty-four examples of alleged conduct were offered in support of the charges filed against her, each example must be found to be proved or disproved and the findings stated in the removal notice. The examples, however, are in the nature of a bill of particulars and are not the ultimate reasons for the dismissal. The reasons for appellant's removal from the classified civil service were clearly stated in the notification of personnel action form:

> "Reasons: Emotional Instability as evidenced by deep-seated feelings and resentments on subjects of sex discrimination, illegitimacy, and men in general. Inefficiency in handling tax cases as evidenced by technical and procedural errors, substandard report writing, and lack of proper audit techniques."

Specific findings with respect to each example of conduct underlying these reasons were unnecessary; and we note that, even had they been made, such findings would be of no value to appellant here for we do not review findings of fact in cases such as this.

Appellant further contends that examples of either emotional instability or inefficiency which occurred during 1959, or any other years for which she received a rating of satisfactory or better, can not be relied upon in this removal proceeding. We disagree. See *Thomas* v. *Ward*, 96 U.S.App.D.C. 302, 225 F.2d 953 (1955), *cert. denied*, 350 U.S. 958, 76 S.Ct. 348, 100 L.Ed. 833 (1956). See also *De Fino* v. *McNamara*, 109 U.S.App.D.C. 300 (1961).[2]

The judgment of the District Court is affirmed.

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[2] Further, it may be pointed out that all but three of the eleven examples of emotional instability and all of the thirteen examples of inefficiency relate to a time for which she had not received the satisfactory rating.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,145

MARY E. SEEBACH,
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Appellees.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, FRANK H. SCHMID, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify this transcript of record in two volumes (volume one numbered from 1 to and including 51 and volume two numbered from 44 to and including 263) to be a full, true and correct copy of the entire record of the above entitled case in the said Court of Appeals, made pursuant to the request of counsel for the appellant Mary E. Seebach, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of January, 1965.

/s/ Frank H. Schmid
FRANK H. SCHMID, Clerk

[SEAL]